

State of New Hampshire

v.

Glenn N. Gidley

Docket No.: 19946-04ED

DECISION

I. Issue Presented

On July 6, 2006, the board held a limited hearing on the “Condemnee’s” Motion to Approve Settlement and Close Docket (the “Motion”) and the “State’s” “Objection” to the Motion. Based on the evidence and legal arguments presented, the board grants the Motion.

The document giving rise to this issue is a one-page, hand-written “Settlement Agreement” (attached as Exhibit A to the Motion) signed by the Condemnee and his attorney (Bernard H. Campbell, Esq.) and by the State through an Assistant Attorney General (Margaret Fulton, Esq., of the Department of Justice). The parties negotiated, prepared and signed the Settlement Agreement on October 4, 2005, shortly before the then scheduled just compensation hearing was set to resume (after the taking of a view but before the first witness was called). The board was orally advised of the settlement at that time and therefore did not proceed with the just compensation hearing.

Approximately one week after this signing, however, Attorney Fulton advised the Condemnee that the State would not perform paragraph 3 of the Settlement Agreement, which contains a covenant (promise) by the State to convey “Parcel 267C” to the Condemnee. (Parcel 267C was not part of the taking in this condemnation proceeding, but had been acquired separately by the State from another individual.)

Attorney Fulton’s October 12, 2005 letter to the Condemnee’s attorney (Exhibit B to the Motion) explained the State had, “back in 2002, made a commitment to the Federal Highway Administration” that Parcel 267C “would be retained for possible future use as a park and ride/bus station facility when the need for such a facility might be more obvious and could be supported by the community and the traveling public.” This letter offered the Condemnee an alternative which the State hoped would be acceptable (“moving the right-of-way line and granting a 50-foot easement over Parcel 267C”).

The Condemnee considered this alternative proposal inadequate and filed the Motion, requesting the board to have the case marked as settled on its docket. The State’s Objection asks the board to set aside the Settlement Agreement and reschedule a just compensation hearing.

II. Board’s Rulings

The board grants the Motion and will mark the docket as “Closed: Case Settled” for the reasons set forth below.

Both parties cite the same case authority in support of the board’s authority to determine whether a case on its docket has been settled. Appeal of Land Acquisition, 145 N.H 492 (2000), involved an oral agreement to settle a tax abatement appeal. The supreme court, citing RSA 71-B:13, noted “The board has jurisdiction to determine the formation and existence of an agreement [embodying a settlement]; the superior court has jurisdiction to enforce it.” Id. at 495.

RSA 71-B:13 gives the Merrimack County Superior Court, not the board, enforcement authority if the board, upon request, files a certified abstract “[a]fter a decision of the board becomes final.”

The board finds the Condemnee met its burden of proving the formation and existence of the Settlement Agreement. The board will address why the State’s arguments regarding authorization and whether a “mutual mistake” precludes recognition of the Settlement Agreement are insufficient in light of the evidence and law presented.

First, there is no basis for concluding the Settlement Agreement was not authorized by the State at the time it was signed by Attorney Fulton on its behalf. The State has not argued she lacked authority to enter the Settlement Agreement, but makes a somewhat different, but related, argument (in paragraph 11 of the Objection) that neither Assistant Attorney General Fulton nor the Attorney General, for that matter, “has the legal authority to order the conveyance of public land” because “A settlement of this nature must be approved by Governor and Council before it can be accomplished.”¹

While it may be true that a conveyance of public land requires subsequent submission and approval by the Governor and Council, there is no evidence the State has made any attempt to obtain such approval with respect to Parcel 267C. Under the relevant authorities cited in Section C in the Condemnee’s “Memorandum of Law,” the State has a good faith obligation to do so, just as a corporate party would have a similar obligation to submit a signed agreement for approval by its board of directors (if its corporate charter required such approval before a

¹ Paragraph 11 further states the board also lacks such “legal authority . . . to order the conveyance of public land.” Nothing contained in this Order states or suggests the board is exercising such authority by ruling on the Motion.

conveyance could take effect). The board finds this to be true even if the State may later have had second thoughts about the efficacy of paragraph 3 of the Settlement Agreement.

There is no dispute that under New Hampshire law an attorney can bind his or her client to a settlement. See, e.g., Bock (Lundstrom) v. Lundstrom, 133 N.H. 161, 165 (1990) (“we have long upheld the enforceability of authorized settlement agreements reached by counsel, whether made by attorneys in their offices, in the courthouse, or on the courthouse steps. (Citation omitted.)”), another case cited by both the State and the Condemnee.

Attorney Fulton, who did not attend the hearing on the Motion, signed the Settlement Agreement after seeking and receiving whatever approvals of its terms, including paragraph 3, she believed were necessary. The Condemnee and his attorney indicated Attorney Fulton negotiated the agreement with them and then conferred with someone privately on her cell phone; she then indicated to them the terms were acceptable to the State and signed the Settlement Agreement on its behalf at the time of the just compensation hearing.

Second, the evidence presented does not support the “mutual mistake” argument made by the State as a ground for setting aside the Settlement Agreement. A mistake by one party to a settlement agreement (such as the amount or type of consideration to be given) is not legally sufficient to set the agreement aside, as noted by the authorities presented and discussed in Section D of the Condemnee’s Memorandum of Law.²

The Condemnee should not be penalized (with the costs and delays caused by setting aside the Settlement Agreement and scheduling and holding a just compensation hearing) simply

² See, e.g., Carignan v. Amoskeag Hamper Company, 95 N.H. 262, 265 (1948) (unilateral mistake does not make agreement voidable; claim for equitable remedy of rescission of agreement requires further factual showings, including whether “grave consequence” of enforcement would be “unconscionable” and whether mistake “occurred notwithstanding the exercise of ordinary diligence by the party making the mistake”). While a court in equity may have the authority to rule on such issues, if they are properly presented, the board does not.

because the State either made a unilateral mistake or changed its position regarding whether it was either preferable or necessary to retain Parcel 267C instead of conveying it to the Condemnee. The State's own appraiser stated in his report (Motion, Exhibit C) prepared well before the just compensation hearing (date of settlement) that "Although noted on the plan, this land will not be developed with a Park and Ride lot. According to Mr. William Cass, NHDOT Project Manager, this land will likely be sold by the NHDOT for residential development following the construction project." (Emphasis added.)

Mr. Cass attended and testified at the hearing on the Motion on the State's behalf, but did not refute this clear and unequivocal statement contained in the appraisal report. Instead, he explained the State had made a decision to defer development of a park and ride facility until some indefinite point in the future rather than as a part of the highway improvement project that required taking the Condemnee's land.

The evidence presented by the State simply shows a park and ride facility was contemplated, as referenced in a Final Environmental Impact Statement signed by the State and the Federal Highway Administration (Condemnor Exhibit 2) in 2004, but not that the State was legally obligated to construct such a facility in any specific location or at any specific point in time. There was no factual showing that the State was irrevocably obligated to develop a park and ride facility on Parcel 267C (precluding a transfer to the Condemnee pursuant to paragraph 3 of the Settlement Agreement) or that the Condemnee was a party to any "mutual mistake" regarding this question. It was not a mistake for the Condemnee to believe in good faith the State had the ability to convey Parcel 267C and would take all necessary and proper steps to do so. The evidence failed to demonstrate a park and ride facility could not be developed on other

land if the State believes it has a future obligation to do so and Parcel 267C is conveyed to the Condemnee as part of a settlement.

The Objection (at paragraph 12 on page 3 and paragraphs A and B on page 4) questions the enforceability of the settlement, stating it “is not practicable” as a basis for setting it aside and rescheduling a just compensation hearing or holding a “hearing to determine” the enforceability issue. The board’s statutory authority, however, does not extend to enforcement, but only to the more narrow issues regarding formation and existence of the Settlement Agreement discussed above. The evidence presented simply failed to establish either lack of authorization or “mutual mistake” as grounds for setting aside the Settlement Agreement. The board therefore grants the Motion and will mark its docket as “Closed: Case Settled.” Any separate equitable arguments (see fn. 2) for not enforcing the settlement are not within the board’s statutory authority, as noted in Land Acquisition, 145 N.H. at 495.

A motion for rehearing, reconsideration or clarification (collectively “rehearing motion”) of this decision must be filed within thirty (30) days of the clerk’s date below, not the date this decision is received. RSA 541:3; TAX 201.37(a). The rehearing motion must state with specificity all of the reasons supporting the request. RSA 541:4; TAX 201.37(b). A rehearing motion is granted only if the moving party establishes: 1) the decision needs clarification; or 2) based on the evidence and arguments submitted to the board, the board’s decision was erroneous in fact or in law. Thus, new evidence and new arguments are only allowed in very limited circumstances as stated in board rule TAX 201.37(f). Filing a rehearing motion is a prerequisite for appealing to the supreme court, and the grounds on appeal are limited to those stated in the rehearing motion. RSA 541:6. Generally, if the board denies the rehearing motion, an appeal to the supreme court must be filed within thirty (30) days of the date on the board’s denial.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Member

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

CERTIFICATION

I hereby certify a copy of the foregoing Decision has been mailed this date, postage prepaid, to: Lynmarie C. Cusack, Esq., State of New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301-6397, counsel for the State of New Hampshire, Condemnor; and Bernard H. Campbell, Esq., Beaumont & Campbell Prof Assn, 1 Stiles Road - Suite 107, Salem, NH 03079, counsel for Condemnee.

Dated: July 28, 2006

Anne M. Stelmach, Clerk